

MENOMINEE TRIBAL ENTERPRISES

v.

AREA DIRECTOR, MINNEAPOLIS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 86-62-A

Decided August 12, 1987

Appeal from a decision issued by the Minneapolis Area Director, Bureau of Indian Affairs, declining to process an attorney contract.

Reversed and remanded.

1. Board of Indian Appeals: Generally--Bureau of Indian Affairs:
Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

2. Board of Indian Appeals: Generally--Bureau of Indian Affairs:
Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

APPEARANCES: Joseph F. Preloznik, Esq., Madison, Wisconsin, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On August 29, 1986, the Board of Indian Appeals (Board) received a letter from Menominee Tribal Enterprises (appellant) seeking review of a decision of the Minneapolis Area Director, Bureau of Indian Affairs (BIA; appellee). In letters dated May 19 and June 24, 1986, appellee declined to process an attorney contract between appellant and Preloznik and Associates, S.C. For the reasons discussed below, appellee's declinations to process the contract are reversed and the matter is remanded to BIA for further consideration.

Background

On October 27, 1934, the Menominee Indian Tribe of Wisconsin (tribe) voted to accept the provisions of the Indian Reorganization Act (IRA),

25 U.S.C. §§ 461-479 (1934). Subsequently, the Act of June 17, 1954, 68 Stat. 250, 252, authorized termination of Federal supervision over the property and members of the tribe. A proclamation terminating Federal supervision was published in the Federal Register. 26 FR 3726 (Apr. 26, 1961).

Federal supervision of the tribe was restored by Congress on December 22, 1973. ^{1/} Under 25 U.S.C. § 903a(a) (1976) the provisions of the IRA were specifically applied to the tribe.

Appellant had its genesis in the termination of Federal supervision. The termination plan published in the Federal Register in 1961 provided for the creation of a state corporation called Menominee Enterprises, Inc. (MEI). A tribal sawmill and lands formerly held in trust for the tribe by the United States were transferred to MEI. During the period when the tribe was not under Federal supervision, MEI managed these assets, with the full powers of a corporation.

Following restoration, MEI became Menominee Tribal Enterprises. Article XII, § 2, of the Menominee Tribal Constitution (constitution) created appellant, making it the "principal business arm of the Tribe."

Article III of the constitution created the Menominee Tribal Legislature (MTL) and made it the tribe's governing body.

The present controversy arose when appellant passed Resolution 86-1 on February 11, 1986. The resolution approved a new attorney contract with appellant's attorney, and was submitted to appellee for approval in accordance with 25 U.S.C. § 476 (1982). ^{2/} Upon receiving the resolution and proposed attorney contract, appellee submitted them to MTL. By Resolution 86-10, May 8, 1986, MTL declined to approve the contract, characterizing it as a usurpation of its powers by appellant. In response to this resolution, by letter dated May 19, 1986, appellee returned the attorney contract to appellant "as requested by the Menominee Tribal Legislature's Resolution 86-10."

Appellant resubmitted the contract on May 23, 1986, attaching copies of a January 21, 1981, decision of the Acting Deputy Commissioner of Indian Affairs and this Board's decision in Menominee Tribal Enterprises v. Acting Deputy Commissioner of Indian Affairs (Menominee I), 9 IBIA 141 (1981). Appellant requested approval of the contract.

^{1/} Act of Dec. 22, 1973, P.L. 93-197, 87 Stat. 770, 25 U.S.C. §§ 903-903f (1976). See especially, 25 U.S.C. § 903a (1976).

^{2/} Section 476 provides in pertinent part:

"In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; * * *."

By letter dated June 24, 1986, appellee again declined to process the contract. Appellee's reasons for this action were:

In the spirit of Self-Determination, all issues and events must be directed to or sanctioned by the elected Tribal Governing Body. It is my interpretation that the Menominee Tribal Enterprises was established by the Constitution in Section XII as the principal business arm of the Tribe. Since we have a specific request, in the form of Menominee Tribal Resolution 86-10 dated May 8, 1986, I see no other action to take but to honor the request of the Legislature.

Appellant appealed this decision to the Washington office of BIA in accordance with 25 CFR Part 2. When no decision was issued within 30 days of the date when the appeal became ripe, appellant requested the Board to assume jurisdiction under 25 CFR 2.19(b). ^{3/} By order dated September 3, 1986, the Board made a preliminary determination that it had jurisdiction over the matter and requested the administrative record. The record was received on January 12, 1987. A briefing schedule was established by Board order dated January 14, 1987. Pursuant to that order, appellant's opening brief was received on February 6, 1987.

By order dated May 22, 1987, appellee was instructed to supplement the record with copies of the constitution and the "Management Plan of Menominee Enterprises, a Tribal Enterprise of the Menominee Indian Tribe of Wisconsin" (management plan). ^{4/} These supplemental materials were received on June 18, 1987.

On June 15, 1987, the Board received a letter from the tribal chairman, seeking to file a late brief in this appeal. Appellant's opposition to allowance of a late brief was received on June 26, 1987. By order dated June 29, 1987, the Board denied the motion because the tribe had been fully informed of the original briefing schedule and the case was already under consideration when the motion was filed.

Section 2.19 states in relevant part:

“(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

“(1) Render a written decision on the appeal, or

“(2) Refer the appeal to the Board of Indian Appeals for decision.

“(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision.”

^{4/} The management plan was originally approved by the Secretary on Apr. 22, 1975. Both the management plan (Section 14(d)) and the constitution (Art. XII, § 1) provided that the management plan would remain in effect for six months after the first tribal governing body took office unless that tribal governing body reaffirmed the management plan on behalf of the tribe. The management plan was reaffirmed by Ordinance/Resolution 79-12.

Menominee I

Appellant has previously appeared before the Board in a very similar case, in which it appealed a decision of the Acting Deputy Commissioner of Indian Affairs holding that its attorney contracts were required by statute to be approved by the Secretary of the Interior. In Menominee I the Board addressed the question of whether appellant was an “Indian tribe or tribal council” within the meaning of 25 U.S.C. § 476 (1976). Acknowledging that appellant was the business arm of the tribe, the Board concluded at page 145 what appellant was “an integral part of the Menominee Tribe, which is subject to the provisions of section 476:”

Section 476 applies to tribal employment of attorneys. Whether the attorney is employed with respect of the business or political affairs or any of the other activities of the tribe appear[s] immaterial so far as the application of section 476 is concerned. The statutory language is clear. Under the Reorganization Act the MTE is subject to section 476. [Ibid.]

Menominee I was remanded to BIA for the determination of whether Secretarial approval of the attorney contract had, in fact, already been given.

Discussion and Conclusions

Implicit in the Board’s holding in Menominee I was the conclusion that appellant has authority under tribal law to employ legal counsel, independently of MTL. ^{5/} However, the issue was not directly addressed by the Board at that time. Now the Board must decide whether appellee properly declined to process appellant’s attorney contract on the grounds that MTL requested him not to process it. It therefore must address the question of appellant’s authority directly: Is appellant a separate tribal entity from MTL so as to have power and authority to contract with an attorney independently of MTL? The answer to this question involves consideration of the constitution and management plan.

[1,2] As always, the Board undertakes this examination of a tribal constitution and other governing documents with deference to the tribe’s interpretation of its own laws. Kiowa, Comanche and Apache Intertribal Land Use Committee v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 207 (1986). In reviewing BIA decisions, the Board has the authority and responsibility to interpret tribal law. Estate of Mary Dodge Peshlakai v. Navajo Area Director, 15 IBIA 24, 93 I.D. 409 (1986) (involving a conflict between interpretations of tribal law by the tribal executive and judicial branches); Crooks v. Minneapolis Area Director, 14 IBIA 181 (1986).

^{5/} This conclusion is more explicit in the decision of the Acting Deputy Commissioner of Indian Affairs, which was on appeal to the Board. That decision stated that “since [appellant], a part of the Menominee Tribe, has the authority to hire an attorney, that employment is subject to [Secretarial approval].”

Here, although MTL was precluded from filing a late brief by the Board's June 29, 1987; order, the record contains evidence of MTL's interpretation of the constitution. Resolution 86-10 states in pertinent part:

WHEREAS, the Menominee Constitution, Article III, Section 1 states:

“ . . . The powers of the Menominee Tribal Legislature shall include those powers vested in the Tribe by Section 16 of the Indian Reorganization Act (48 Stat. 987) [25 U.S.C. § 476] namely, to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior. . . ”

The resolution further states that MTL considers appellant's submission of the attorney contract to BIA to be a usurpation of MTL's powers, and demands that the contract be refused by the Secretary on "grounds of insufficiency in that it is not accompanied by a support resolution from [MTL]." It is thus apparent that MTL believes it alone has the authority to contract for legal services.

Appellee, who also did not file a brief in this appeal, appears to concur with MTL's interpretation, as he indicates both by his initial request for MTL's response to the proposed attorney contract and by his deference to Resolution 86-10. However, his apparent present position is at odds with his previous actions, in particular, his approval of an attorney contract for appellant in December 1982 without the concurrence of MTL. 6/

Appellant argues that the constitution and management plan specifically and carefully establish two separate legal entities: itself, as the business arm of the tribe; and MTL, as the political arm. 7/ In support of this position, appellant cites provisions of the constitution and management plan; an August 15, 1980, opinion by the Department's Minneapolis Field Solicitor; and this Board's decision in Menominee I.

There is no dispute that MTL is the political branch of the tribe. As such, it is clear that Article III, § 1, of the constitution gives MTL power to employ legal counsel, subject to approval by the Secretary. The question raised by this case is whether MTL's authority to employ legal counsel extends to counsel employed to assist appellant in the business operations of the tribe.

6/ By letter of Mar. 4, 1983, the tribal chairman objected to appellee's having approved the contract without notifying the tribe. She requested that the tribe be furnished with documents concerning future contract approval requests by appellant but did not assert that appellant lacked the authority to employ legal counsel without the approval of MTL.

7/ Although not relevant here, the constitution also establishes a separate tribal judiciary.

Article XII, § 2(b), of the constitution sets forth the scope of appellant's authority:

The scope of authority of the Successor Business [i.e., appellant] shall be to manage and operate the property designated in this subsection * * * in order to conduct the business operations of the Tribe which will best promote the interests of the Tribe and of the Tribal members. * * * [T]he Successor Business shall be granted all powers necessary to manage and operate the subject property in order properly to perform its duties as set forth herein. * * *

* * * * *

The Tribal Legislature shall have no authority over the operations of the Successor Business except as specifically set forth in this section. However, the Tribal Legislature shall retain all authority and power to exercise all proper governmental and sovereign functions over the property managed or owned by the Successor Business.

Section 3 of the management plan describes appellant's purpose:

The tribal enterprise [now appellant] shall be the principal business arm of the Tribe. The tribal enterprise is authorized to act on behalf of the Tribe in regard to the business dealings of the Tribe, as set forth in this management plan, * * *. The tribal enterprise shall manage and operate the subject property in order to conduct the business operations of the Tribe. The primary obligation of the tribal enterprise shall be to manage and operate the subject property in a businesslike manner which will best promote the interests of the Tribe and of the tribal members.

* * * * *

The Tribe shall exercise all proper governmental and sovereign functions in regard to the subject property * * *.

* * * * *

This management plan shall be liberally construed in order to achieve the purposes set forth in this section.

Section 4 of the management plan concerns appellant's powers:

The directors of the tribal enterprise shall be vested with all powers necessary to permit the tribal enterprise to manage and operate the subject property in order properly to conduct the Tribe's business operations. Such powers shall include, but shall not be limited to * * *:

* * * * *

e. To enter into contracts for logging, road work, maintenance, repairs, and all other matters reasonably necessary to conduct the business operations of the tribal enterprise.

* * * * *

g. To enter into agreements, contracts, joint ventures, and partnerships with any governmental agency or with any person, partnership, corporation or Indian tribe; and to agree to any reasonable conditions attached to federal financial assistance.

* * * * *

r. To take such further actions as are commonly engaged in by corporate bodies, as the board of directors may deem reasonably necessary to effectuate the purposes of the tribal enterprise.

* * * * *

t. To conduct all other activities reasonably necessary (i) to implement the powers enumerated above or (ii) to further the business needs of the Tribe.

In 1980, the Minneapolis Field Solicitor construed these provisions and concluded that appellant was "a separate legal entity from the governmental unit of the tribe." ^{8/} Citing Article XII, § 2(b), of the constitution and the reference to powers of business corporations in Section 3 of the management plan, the Field Solicitor further opined "that the Menominee Tribal Enterprise has the authority to hire counsel as needed for business purposes." *Id.* at 2. The Field Solicitor ultimately concluded that, although appellant was a separate entity from the political unit of the tribe, it was still part of the tribe, and therefore subject to the requirement that its attorney contracts be approved by the Secretary.

Appellee followed the Field Solicitor's opinion in requiring appellant to submit an attorney contract for approval. Although appellant objected to this requirement, it was upheld by the Acting Deputy Commissioner of Indian Affairs. The controversy finally reached the Board as Menominee I. As previously noted, the Board held appellant was subject to the provisions of section 476 and was, therefore, required to submit its attorney contracts for approval by the Secretary. ^{9/} There was no suggestion in Menominee I that employment of an attorney by appellant was subject to the approval of MTL.

^{8/} Letter from Minneapolis Field Solicitor to Minneapolis Area Director, BIA, Aug. 15, 1980, at 1.

^{9/} Appellant does not dispute in the present case that its attorney contract is subject to Secretarial approval.

The question now before the Board has, therefore, previously been addressed within the Department, with the conclusion that appellant has authority under the constitution and management plan to employ legal counsel to assist it in the business operations of the tribe independent of the authority of MTL to employ legal counsel for tribal governmental purposes. In view of the history of this matter in the Department, including proceedings in which MTL as well as appellant had an opportunity to participate, and the conflicting interpretations of the constitution now advanced by different parts of the tribe, it would be inappropriate for the Board simply to defer to MTL's interpretation. The Department's previous interpretation is a completely reasonable interpretation of the tribal governing documents when those documents are read together, as they must be. The Board sees no reason for departing from this interpretation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Minneapolis Area Director's May 19 and June 24, 1986, declinations to process appellant's proposed attorney contract are reversed. This matter is remanded to the Bureau of Indian Affairs with instructions to process the proposed attorney contract.

Kathryn A. Lynn
Administrative Judge

I concur:

Anita Vogt
Acting Chief Administrative Judge